MOTION FILED

SEP 10 1996

(11)

No. 95-897

In The
Supreme Court of the United States

October Term 1996

FRANCIS AUER, ET AL.,

Petitioners,

vs.

DAVID ROBBINS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO FILE BRIEF
AND
BRIEF AMICUS CURIAE
OF
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.
IN SUPPORT OF
THE RESPONDENTS

(List of Counsel on Inside Front Cover)

BEST AVAILABLE COPY

14 pp

OF COUNSEL:

ROY CALDWELL KIME, ESQ.
Legislative Counsel
International Association of
Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

Counsel for Amicus Curiae

JODY M. LITCHFORD, ESQ.
Chair, Legal Officers' Section
International Association of
Chiefs of Police, Inc.
City Hall, Office of Legal Affairs
Orlando, Florida 32801

WAYNE W. SCHMIDT, ESQ.
Vice-Chair,
Legislation Committee
International Association of
Chiefs of Police, Inc.
5519 North Cumberland
Avenue, #1008
Chicago, Illinois 60656-1498

JAMES P. MANAK, ESQ.
Counsel of Record,
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tel/Fax (630) 858-6392

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION OF *AMICUS CURIAE* TO FILE BRIEF 1

BRIEF OF *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 3

ARGUMENT 4

I. PRINCIPLES OF FEDERALISM EMBODIED IN THE UNITED STATES CONSTITUTION PRECLUDE THE CONGRESS, ACTING PURSUANT TO THE COMMERCE CLAUSE, FROM ABROGATING STATE AND LOCAL GOVERNMENTAL SOVEREIGNTY. 4

II. THIS COURT SHOULD RE-EXAMINE ITS DECISION IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY* IN LIGHT OF ITS RECENT DECISIONS IN *SEMINOLE TRIBE OF FLORIDA v. FLORIDA* AND *UNITED STATES v. LOPEZ*. 6

III. CONGRESS MAY NOT EXTEND THE FLSA TO MUNICIPAL OR COUNTY LAW ENFORCEMENT, EVEN IF IT MAY DO SO FOR QUASI-COMMERCIAL AND PROPRIETARY GOVERNMENTAL FUNCTIONS. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Adams v. State of Kansas, No. 94-4201-RDG, 1996 U.S. Dist. LEXIS 9462, 3 Wage & Hour Cas. 2d (BNA) 626 (D. Kan. June 24, 1996) 6
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 6, 7, 8
National League of Cities v. Usery, 426 U.S. 833 (1976) 6
Seminole Tribe of Florida v. Florida, 517 U.S. __, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) 4
United States v. Lopez, 514 U.S. __, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 4, 5

United States Constitution

Amendment X . . . . . *passim*
Amendment XI 6

Statutes

29 U.S. Code at 201 et seq. 6

Periodical

Lee, *The Political Safeguards of Federalism?, Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 THE URBAN LAWYER (ABA) 301 (1988) 9

No. 95-897

In The Supreme Court of the United States

October Term, 1996

FRANCIS AUER, ET AL.,
Petitioners,

vs.

DAVID ROBBINS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF THE RESPONDENTS.

This brief is filed pursuant to the rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Respondents. An unconditional consent to file has not been received from Counsel for the Petitioners. The letters of Petitioners and Respondents have been filed with the Clerk of this Court, as required by the rules.

The International Association of Chiefs of Police, Inc.

moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the national level.

Because of the relationship with our members, and the composition of our membership and directors, including active law enforcement administrators and counsel at the national level, we are particularly aware of the impact of the ruling of the court below on the management and administration of law enforcement agencies at all levels of government. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing That Existing Briefs May Not Present All Issues.* IACP is an international and national association, and its perspective is broad. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for Respondents and Petitioners in an effort to avoid unnecessary duplication. It is believed that this brief presents

vital policy issues directly related to law enforcement management and administration that are not otherwise raised by either party.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Respondents has been received and filed with the Clerk of this Court. This motion is necessary because the counsel for Petitioners has placed conditions on the scope and content of *amicus'* brief, which *amicus* considers, in effect, a declination of consent by petitioners under the rules, necessitating this motion. Letters of both counsel have been filed with the Clerk of this Court.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

WAYNE W. SCHMIDT, ESQ.
5519 North Cumberland Avenue, #1008
Chicago, Illinois 60656-1498
Telephone: (800) 763-2802
Co-Counsel for Movant Party, Amicus Curiae

INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae, supra.*

ARGUMENT

I.

PRINCIPLES OF FEDERALISM EMBODIED IN THE UNITED STATES CONSTITUTION PRECLUDE THE CONGRESS, ACTING PURSUANT TO THE COMMERCE CLAUSE, FROM ABROGATING STATE AND LOCAL GOVERNMENTAL SOVEREIGNTY.

This case once again raises issues involving the extent of Congressional authority to infringe on traditional areas of local governance. This Court has recently addressed appropriate limitations of Congress' power to legislate pursuant to the Interstate Commerce Clause in two significant cases, *United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) and *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Both of these cases emphasized that Congress' ability to enact legislation pursuant to the Commerce Clause is not absolute.

In the *Seminole Tribe* case, this Court invalidated provisions of the Indian Gaming Regulatory Act, holding that the Indian Commerce Clause, similar in this regard to the Commerce Clause, could not be read to abrogate the balance of power between state and federal power otherwise guaranteed by the Constitution. Although the Court did not reach the issue of whether the legislation at issue similarly violated the Tenth Amendment (noting in footnote 10 that the issue was not considered at the District or Circuit Court level), the general principles of federalism are the same with respect to the Tenth Amendment.[1] As this Court found in the *Seminole Tribe* case, Congressional Commerce Clause authority cannot be read to abrogate the balance of power between the federal government and the state and its political subdivisions. It is this delicate

[1] In the instant case the defendants raised the constitutional issue before Judge Cahill; see Transcript Vol. V, pp. 168 et seq.

balance of power upon which our system of government depends.

In the *Lopez* case, this Court discussed the general limitations on Congressional authority pursuant to the Commerce Clause. The Court reiterated the limitations of this authority particularly with respect to state and local governments:

> But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' (citations omitted).

Lopez, supra, 115 S. Ct. at 1628-9.

Lopez goes on to consider traditional areas of local governmental sovereignty within which Congress is not free to intrude, including among them "areas such as criminal law enforcement . . .." *Lopez, supra*, 115 S. Ct. at 1632. It would be difficult to conceive of an area of authority more quintessential to local governmental autonomy than the right to set and pay rates and work schedules for police employees paid with local tax dollars.

The instant case deals with the application of the Fair Labor Standards Act, enacted by Congress pursuant to the Commerce Clause, to criminal law enforcement personnel employed by a local governmental entity, the St. Louis Metropolitan Police Department. The principles of federalism, that protect state and local governments from excessive intrusion into their ability to operate their own affairs

recognized in *Seminole Tribe* and *Lopez*, should preclude the federal government from imposing the Fair Labor Standards Act requirements in this instance.[2] To the extent that adherence to these principles requires reversal or modification of this Court's previous decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), then that decision should be reconsidered.

II.

THIS COURT SHOULD RE-EXAMINE ITS DECISION IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY* IN LIGHT OF ITS RECENT DECISIONS IN *SEMINOLE TRIBE OF FLORIDA v. FLORIDA* AND *UNITED STATES v. LOPEZ*

The federal Fair Labor Standards Act (FLSA), 29 U.S. Code § 201 et seq., at issue in this case, was originally enacted in 1938, and amended in 1974 to extend to virtually all public employees of state and local governments. In 1976, this Court concluded that the setting of wages and hours of employment was an integral governmental function protected by principles of federalism embodied in the Tenth Amendment.

This Court held, therefore, that Congress had exceeded its scope of authority under the Commerce Clause when it included county or municipal governments within the scope of the FLSA. *National League of Cities v. Usery*, 426 U.S. 833 (1976). That decision was subsequently reversed by *Garcia v. San Antonio Metropolitan Transit Authority (SAMTA)*, 469 U.S. 528 (1985). In reaching its decision in *SAMTA*, the majority

---

[2] *Amicus* notes that at least one federal judge had interpreted this Court's holding in *Seminole Tribe* to require the dismissal of an overtime suit by state correctional officers, finding that the suit violated the Eleventh Amendment. *Adams v. Kansas*, N. 94-4201-RDG, 1996 U.S. Dist. LEXIS 9462, 3 Wage & Hour Cas. 2d (BNA) 626 (D. Kan. June 24, 1996).

abandoned the existing Court precedent, concluding that the prerequisites for governmental immunity under *National League of Cities*, particularly the identification of "traditional governmental functions," was confusing and unworkable. The Court then went on to find that a publicly owned bus enterprise, one that received considerable federal funding, should be subject to the FLSA's overtime provisions.

In abandoning the "traditional governmental functions" standard, however, the *SAMTA* majority failed to adopt any more workable test for determining the outside parameters of Congressional Commerce Clause authority vis-a-vis local and state governments. In fact, the *SAMTA* majority suggested that Congress' ability to regulate under the Commerce Clause was not subject to the limitations of other Constitutional provisions designed to protect against federal overreaching; the majority held that the interpretation of the limitations of Commerce Clause powers should be left up to the Congress to set for itself.

The recent decisions of this Court in *Seminole Tribe* and *Lopez* have abrogated the continued validity of this notion, specifically affirming the principles of federalism initially followed by the Court in *National League of Cities* and cited by the dissent in *SAMTA*, which noted that "by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." 469 U.S. 528, 572 (Powell, et al., dissenting).

In *Lopez* and *Seminole* Tribes, this Court has reaffirmed its commitment to enforcing appropriate limitations on Congress' Commerce Clause authority with respect to state and local governments. Now, this Court has an opportunity to modify or limit the decision in *SAMTA*, to clarify the limitations on the Commerce Clause found in the Tenth Amendment, and to protect the sovereignty of state governments and their political subdivisions.

III.

CONGRESS MAY NOT EXTEND THE FLSA TO MUNICIPAL OR COUNTY LAW ENFORCEMENT, EVEN IF IT MAY DO SO FOR QUASI-COMMERCIAL AND PROPRIETARY GOVERNMENTAL FUNCTIONS.

Although in *SAMTA*, this Court overruled *National League of Cities*, the actual holding of the case was only that the FLSA could constitutionally be applied to a local government-owned transit authority. In reaching this decision, the Court reviewed extensively the history of mass transit as it affected that case, including the history of federal funding received by that entity. That decision left open the issue of whether the Congress could apply the FLSA to *all* public employees.

Assuming, *arguendo*, the continued validity of *SAMTA*, we urge this Court to recognize a determinative difference between a publicly-owned transit authority and a law enforcement agency. There is no function more critical for the preservation of a community than the protection of lives and property. In America, it is the local police and sheriffs who have a statutory and primary duty for law enforcement. The power to serve arrest warrants, to execute search warrants, to confine individuals against their will and to generally enforce the penal codes are all inherent governmental functions which cannot be exercised independent of governmental authority.

Conversely, a transit operation is commercial in nature and can be completely entrusted to private enterprise.[3] In virtually every venue, public and private transportation services co-exist. Most are funded in whole or in part by user fees. In response to rising labor costs, whether federally mandated or otherwise predicated, transit entities, whether public or private, can simply raise their fares to cover these costs.

---

[3] The San Antonio Transit Company, the predecessor to SAMTA, was privately owned before 1959. *See* 469 U.S. at 531.

Law enforcement agencies do not have similar economic luxuries. Federally mandated increased labor costs cannot be passed along to the consumer by increasing fees. Any increased costs would of necessity be borne by the citizen taxpayer.[4] The dissimilarities in this regard between public safety agencies and quasi-commercial operations such as a transit authority could not be more profound.[5]

We urge this Court, at a minimum, to recognize the fundamental difference between regulation affecting the delivery of necessary and essential services, such as law enforcement, and those which are proprietary or quasi-commercial in nature such as transit authorities. The application of the *SAMTA* decision should be limited to the latter category of governmental activity.[6]

---

[4] The fiscal impact of the FLSA is significant. The Congressional Budget Office estimated initially in 1985 that the local costs of compliance for the first year alone would total between $500 million and $1.5 billion nationally. Lee, *The Political Safeguards of Federalism?, Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 THE URBAN LAWYER (ABA) 301, 310 (1988).

[5] In addition, the predicate purpose of the overtime provisions of the FLSA (to encourage employers to hire more workers and avoid the payment of premium pay) cannot rationally be applied to law enforcement. Overtime work in law enforcement is normally occasioned by either emergency operations or required appearances in the judicial process. Neither situation can be controlled meaningfully by the employer, nor can either function be performed by a temporary labor pool hired on an as-needed basis. The FLSA's impact on law enforcement is not consistent with its intended nor actual effect on the private sector. It is simply a federal mandate to pay higher overtime wages to the police.

[6] Although the "commercial/proprietary" vs. "traditional governmental" distinction is not always clear, we believe few individuals would suggest that law enforcement agencies perform commercial activities and are unworthy of Tenth Amendment protections.

CONCLUSION

Principles of federalism require that Congressional action be controlled by the Constitution. The Court must not permit the extent of federal authority over state and local governments to be exclusively controlled by Congress' contemporary political and social agenda. In deciding SAMTA, the Court effectively ceded its obligation to determine the extent of Congressional authority under the Commerce Clause back to the legislature. We respectfully urge this Court to re-examine *SAMTA*, to reassert its authority to interpret the Commerce Clause and in this case to conclude that Congress lacks the constitutional power to extend the FLSA to county and municipal law enforcement agencies.

Respectfully submitted,

OF COUNSEL:

ROY CALDWELL KIME, ESQ.
Legislative Counsel
International Association of
Chiefs of Police, Inc.
515 North Washington Street
Alexandria, Virginia 22312

JODY M. LITCHFORD, ESQ.
Chair, Legal Officers' Section
International Association of
Chiefs of Police, Inc.
City Hall, Office of Legal Affairs
Orlando, Florida 32801

WAYNE W. SCHMIDT, ESQ.
Vice-Chair,
Legislation Committee
International Association of
Chiefs of Police, Inc.
5519 North Cumberland Avenue
#1008
Chicago, Illinois 60656-1498

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tel/Fax (630) 858-6392

Counsel for Amicus Curiae